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No. 14-419

IN THE

Supreme Court of the United States

SILA LUIS, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief *Amicus Curiae* of U.S. Justice Foundation, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Lincoln Institute, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

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These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, and related issues.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Many of these organizations filed an *amicus curiae* on the dangers of asset forfeiture laws brief in Kaley v. United States, 571 U.S. ___ (2014).[2]

STATEMENT

Asset forfeiture laws entrust to government with inherently dangerous powers, and those laws which authorize pre-conviction seizures are particularly fearsome. This case[3] involves the government's misuse of a federal **civil** forfeiture statute (18 U.S.C. § 1345) to seize, after indictment, but before conviction, effectively all of Petitioner's assets — including untainted assets which the government neither owns nor rightfully claims — preventing Petitioner from retaining her counsel of choice as she is entitled under the Sixth Amendment.

Although federal courts appear to have become comfortable with the increasingly unbridled practice of asset forfeiture — the pendulum has been allowed to swing too far, authorizing the exercise of arbitrary government power against the people, and resulting in current policy being critically re-examined in Congress, by the press, and even by former U.S. Department of Justice lawyers who once enforced asset

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[2] http://www.lawandfreedom.com/site/constitutional/KaleyvUS_amicus.pdf

[3] United States v. Luis, 564 Fed. Appx. 493 (11th Cir. May 1, 2014) Pet. App. 1; United States v. Luis, 966 F. Supp.2d 1321 (S.D.FL. June 21 2013) Pet. App. 8.

forfeiture laws.[4] It is important to note that the two primary cases on which the court of appeals below relied, Caplin & Drysdale and Monsanto, were both narrow 5-4 decisions. In a single dissent filed in both cases, Justices Blackmun, Brennan, Marshall, and Stevens vociferously denounced the government's claim of "a property interest in forfeitable assets, predicated on the relation-back provision" contained in 21 U.S.C. § 853(c) — as based on "a legal fiction to grant the Government title in all forfeitable property as of the date of the crime." These justices believed that resort to this fiction "gives the Government no property interest whatsoever ... before the defendant is convicted." *Id.* at 652.[5]

In the present case, the courts below have piled on yet another fiction — that "common sense" permits asset forfeiture laws to be used by the government to assemble a pool of assets, from which it could later collect if the defendant were convicted. Such a view finds no support either in the Caplin & Drysdale/ Monsanto dissent or in their majority opinions.

Petitioner correctly asserts the existence of a division within the circuits, in that the decision of the

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[4] *See e.g.*, J. Yoder & B. Cates, "Government self-interest corrupted a crime-fighting tool into an evil," *Washington Post* (Sept. 18, 2014). http://preview.tinyurl.com/mv8sv3v.

[5] As to the Sixth Amendment issue, these justices viewed "it ... unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial." *Id.* at 635.

Eleventh Circuit below is at odds with the Fourth Circuit decision in United States v. Farmer, 274 F.3d 800, 804 (4th Cir. 2001). In addition, the lower courts' decisions are at odds with the position of the Sixth Circuit, providing further reason for this court to grant *certiorari*. *See* United States v. Brown, 988 F.2d 658 (6th Cir. 1993), discussed *infra*.[6] Lastly, the decision below conflicts with the principles previously enunciated by the Eleventh Circuit in United States v. Bissell, 866 F.2d 1343 (1989), discussed *infra*.

In addition to the conflict in the circuits, these *amici* contend that this Court should grant *certiorari* because the Eleventh Circuit's decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Supreme Court Rule 10(a).

SUMMARY OF ARGUMENT

The district court improperly seized assets of the Petitioner over which the government has no property interest in violation of the Fifth Amendment, denying her the right to retain counsel of choice in violation of the Sixth Amendment. Each of the myriad federal laws authorizing seizures of assets are different, and the district court was careless in utilizing 18 U.S.C. § 1345 to seize Petitioner's untainted assets. The district court never made the findings of dissipation of

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[6] The Luis decision also appears to be in tension with several federal district courts. *See, e.g.*, United States v. Sriram, 147 F. Supp. 2d 914 (N.D.IL. 2001), discussed *infra*.

tainted property required by the statute. Then it imposed the seizure on the gross proceeds of Petitioners' business, even though such a power, if it exists at all, is reserved by statute to post-conviction seizures. Such a reading of the statute was not compelled; indeed, the decisions of the courts below constitute outliers even in the area of asset forfeiture where courts have been highly deferential to broad readings of statutes as advanced by prosecutors.

Then, the Court of Appeals failed to do its duty to review Petitioner's Constitutional claims *de novo* by claiming without analysis that four prior decisions, including three decisions of this Court, "foreclosed" Petitioner's appeal, when those decisions could never be read to have resolved the issue on appeal.

The district court also badly misunderstood fundamental principle of asset forfeiture, as well articulated by a prior Eleventh Circuit decision which warned against using these laws to create pools of assets against which the government could later assert claims. Asset forfeiture law was designed to permit government seizure only of property over which the government has a superior property interest — not the property of another. In so doing, the courts below abrogated Petitioner's protected common law property rights, including the right to expend her property to retain counsel of her choice.

As Congress and the courts have cooperated in the vast expansion of federal asset forfeiture powers, federal prosecutors have been given tools that no one in government should have, powers which put the

American people in fear not of punishment for crime, but fear of the exercise of arbitrary power by their government.

ARGUMENT

I. THE ELEVENTH CIRCUIT HAS MISAPPLIED THE FEDERAL FRAUD INJUNCTION STATUTE, SANCTIONING THE GOVERNMENT'S SEIZURE OF PROPERTY OVER WHICH IT HAS NO LAWFUL CLAIM.

The present case involves what is referred to as the federal Fraud Injunction Statute, 18 U.S.C. § 1345. This statute was enacted as part of the Comprehensive Crime Control Act of 1984, 98 Stat. 1837, 2152, which was amended in 1988 to apply to fraudulent claims against the United States and conspiracies to defraud the United States. In 1990, the statute was amended again "in the wake of the multi-billion dollar savings and loan debacle" to apply to "banking-law violations,"[7] and was otherwise modified into its present form.[8]

Section 1345 is just one of scores of federal statutes which govern civil and criminal asset forfeitures. *See generally* S. Cassella, "Overview of Asset Forfeiture

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[7] *See generally* United States v. Brown, 988 F.2d 658, 660-61 (6th Cir. 1993).

[8] The statute was further amended in 1994 and 1996 in other ways not relevant here (except to add "Federal health care fraud" to the list of offenses).

Law in the United States," U.S. Attorneys' Bulletin (Nov. 2007); the U.S. Department of Justice's Asset Forfeiture & Money Laundering Statutes compendium runs 349 pages.[9] Varying significantly, each asset forfeiture statute provides for the forfeiture of different assets, and although the constitutional issues herein apply broadly, each such statute must be analyzed according to its specific language.

Petitioner was indicted, and the government contemporaneously initiated a civil action under § 1345 to seize petitioner's assets. The government claimed that petitioner committed what is called "a Federal health care offense," establishing one of the predicates to use of this forfeiture statute. However, the courts below failed to determine whether the other preconditions were met, and misapplied the statute in other respects as well.

A. The District Court Misapplied Section 1345.

The district court granted an *ex parte* Motion for a Temporary Restraining Order and later issued an Order setting out its opinion, together with a Preliminary Injunction preventing disposing of property well beyond the scope of tainted assets.[10]

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[9] http://www.justice.gov/criminal/afmls/pubs/pdf/statutes2013.pdf.

[10] Luis was enjoined:

> 2. From ... disposing of ... any moneys ... that are **proceeds or profits** from Defendant Luis's Federal health care offenses **or property of an equivalent value** of such **proceeds**

The prerequisites for the government to file a civil action under § 1345[11] to enjoin violation of a "Federal health care offense" appears to have been met. However, to seize assets, the district court must first find that the defendant is:

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or profits; [and]

3. From ... disposing of ... assets, real or personal ... **up to the equivalent value** of the **proceeds** of the Federal health care fraud (**$45 million**). [Pet. App. at 6 (emphasis added.]

[11] 18 U.S.C. § 1345(a) states in full:

(1) **If** a person is--

(A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a **conspiracy to defraud the United States** or any agency thereof), or 1001 of this title;

(B) committing or about to commit a **banking law violation** (as defined in section 3322(d) of this title); or

(C) committing or about to commit a **Federal health care offense**;

the Attorney General may commence a **civil action** in any Federal court to **enjoin** such violation.

(2) **If** a person is alienating or disposing of property, or intends to alienate or dispose of **property, obtained as a result of** a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense **or property which is traceable to such violation**, the Attorney General may commence a **civil action** in any Federal court--

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to--

(i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property **or property of equivalent value**; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.... [Emphasis added.]

> alienating or disposing of property, or intends to alienate or dispose of property, obtained **as a result of** a banking law violation ... or a Federal health care offense or property which is **traceable to such violation**.... [18 U.S.C. § 1345(a)(2) (emphasis added).]

Thus, section 1345 requires the court to find that the person is disposing of, or intends to dispose of, property which has been taken illegally — not property which he legitimately owns. To that end, the statute assumes that a person has assets of two types, which we term Type I and Type II assets:

> (i) **Type I assets** are those obtained "as a result of" or "traceable to" illegal behavior. Even if these assets are in the possession of a defendant, the government has a superior property interest in such property based on the theory that it was, essentially, stolen from the government.
>
> (ii) **Type II assets** are those obtained in legitimate ways, which assets remain under a person's full ownership and control. Over these Type II assets, the government has no property interest whatsoever.

Even a person under federal criminal indictment is at complete liberty to expend some or all of his Type II assets without triggering the district court's powers under § 1345. A district court may exercise its powers under § 1345 only if it first finds that a person has alienated, or threatens to alienate, property over which the government claims a superior property

interest — that is, the person is jeopardizing Type I assets.

From its opinion and the evidence discussed therein, it is by no means clear that the district court had a record sufficient to make such a finding, or even that it made such a finding. When discussing the dissipation of assets, the district court references the testimony of an FBI Special Agent who spoke of transferring funds and purchasing "luxury items, real estate, automobiles, and to travel" — never testifying whether these expended assets were tainted or untainted.[12] Moreover, the district court made no distinction between these two types of assets in its Order, finding only that:

> Defendant Luis has alienated or disposed of property, and unless enjoined could continue to alienate or dispose of property, [i] obtained as a result of a Federal health care offense, [ii] property which is traceable to such violation, **or** [iii] **property of equivalent value**. [*Id.* at Pet. App. 5 (emphasis added).]

Since the three categories of assets were stated in the disjunctive, the Court's finding was only that Luis had disposed of some type of property. But a finding that Luis had disposed of "property of equivalent value" is insufficient under § 1345 to vest the district court with

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[12] Although the district court peppers its analysis with claims of lavish living by Petitioner, this alone does not demonstrate that Type I assets were jeopardized, and is well short of the required statutory finding. Pet. App. at 13-14.

authority to enter any type of restraint on Petitioner's assets.

B. The District Court Improperly Determined the Amount of the "Proceeds or Profits" of the Allegedly Illegal Activity.

The district court relied on statements drawn from the hearing and the declarations before the court, which were ambiguous at best, concluding: "Luis also received approximately $4,490,000 of the funds directly" and "Medicare paid [Luis' companies] $45 million dollars [sic], only a fraction of the funds were located." Pet. App. 14. The district court clearly viewed "the proceeds of the Federal health care fraud [to be] ($45 million)." Pet. App. 6. Disregarding Petitioner's showing that the claimed fraud involved only a portion of the total billings of $45 million, and relying only on "the affidavit of a law enforcement officer," the court found that "there is probable cause to believe that ... $45 million was obtained illegally as a result of those offenses." Pet. App. 14-15. *See also*, Pet. App. 15, n.3.

The Court of Appeals adopted the position of the district court, finding that it had "authority to restrain 'property of equivalent value' to that actually traceable to the alleged fraud." Pet. App. 2. However, the district court conducted no tracing in accepting the government's theory that of the $45 million in gross receipts received by Petitioners' business could be seized." Certainly, the district court's assumption that every penny received by Petitioner's companies was fraudulently obtained was unsupported.

The district court erroneously interpreted § 1345 as though it authorized the forfeiture of the "gross proceeds" of an offense. Although a broader power arguably is contained in an asset forfeiture statute governing federal health care offenses, that statute, 18 U.S.C. § 982(a)(7), only applies **after conviction**, and is limited to "gross proceeds traceable." [13] No such power to seize "gross proceeds" exists under § 1345 before conviction.

Circumventing the language of § 1345, which limits the injunction to "proceeds or profits," the district court wrongly assumed that there was a statutory basis for a *de facto* tainting of all assets of Petitioner.

C. The District Court Improperly Allowed the Seizure of Untainted Funds.

The district court's powers under § 1345 are limited:

> (A) to **enjoin such** alienation or disposition of property; or
> (B) for a **restraining order** to--
> (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any **such property** or **property of equivalent value**; and
> (ii) appoint a temporary receiver to administer such restraining order. [Emphasis added.]

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[13] *See also* 21 U.S.C. § 853(p) (relating to "substitute assets").

Subsection (A) is clear — the district court may only **enjoin** "**such** alienation or disposition of property" — which refers back to property "obtained **as a result of** a banking law violation ... or a Federal health care offense ... or property which is **traceable to** such violation" — and no injunction could extend further to other property. (Emphasis added.)

However, Section (B) appears to extend a court's powers to issue "**restraining order**[s]," to "property of equivalent value." (Emphasis added.) The district court assumed that this section allowed the seizure of untainted assets throughout the trial, but such an interpretation conflicts with other principles and precedents.

First, other courts acting under § 1345 have interpreted this language so as to stop the government from using the statute to achieve a very different purpose from the one for which such statutes were written. Pretrial asset seizure was never designed to ensure that all of an individual's assets were available for collection should the government obtain a criminal forfeiture after a conviction. It was designed only to protect the government's current alleged superior property interest in specific property, not some

speculative future property interest.[14] *See* discussion *infra*, Section III.

Second, in subsections (A) and (B), Congress distinguished between the court's powers in granting a temporary restraining order and a preliminary injunction. Subsection (A) (using the word "enjoin") would apply only to injunctions (preliminary and permanent) of the sort entered by the district court on June 21, 2013. Section (B) (using the word "restraining order") would apply only to temporary restraining orders (such as entered by the district court on October 3, 2012). This view arguably is consistent with the statute's authorization of the appointment of a "temporary receiver." Under this view, the court could enter a temporary restraining order to freeze temporarily more assets and give the government time to determine which assets were traceable to the crime. Then, once the government had performed such tracing, the injunction would be narrowed to apply only to those assets in which the government had a superior property interest.[15]

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[14] The word "untainted" does not even appear in the 349-page U.S. Department of Justice's Asset Forfeiture & Money Laundering Statutes compendium. And it appears only once in the Department's 173-page Asset Forfeiture Policy Manual. http://www.justice.gov/criminal/afmls/pubs/pdf/policy-manual-2013rev.pdf.

[15] This view appears to have been rejected in the Eleventh Circuit (DBB) but applied by at least one federal district court (Savran). *See* discussion *infra*.

Third, the district court in Luis held that "1345 permits the restraint of substitute assets...." App. 18. (The Eleventh Circuit also mentions "substitute assets" on Pet. App. 2.) However, the term "substitute assets" nowhere appears in § 1345, as it does in some other forfeiture statutes. The Sixth Circuit found it significant that 21 U.S.C. § 853 has a "substitute asset" provision and 18 U.S.C. § 1345 does not. *See* United States v. O'Brien, 1999 U.S. App. LEXIS 9147, *8-9 (6th Cir. 1999) (emphasis added). Thus, Congress knew how to create a statute which extended explicitly to "substitute assets" as it did in 21 U.S.C. § 853(p), but Congress certainly did not do so in 18 U.S.C. § 1345. In authorizing sequestration of "substitute assets," section 853(p) imposes careful preconditions, such as the unavailability of tainted assets because they are outside of the court's jurisdiction.[16] Under the district court's view, there are no such preconditions under § 1345.

Lastly, although not analyzed in this fashion, section 1345 appears to have been interpreted properly by the Sixth Circuit and several district courts. In those cases, the courts turned back government efforts to freeze untainted assets under § 1345.

In United States v. William Savran & Associates, 755 F. Supp. 1165 (E.D. N.Y. 1991), the government sought to freeze a bank account which contained all of the defendant's money, from both legitimate sources

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[16] As Petitioner has noted, only one Circuit has determined that § 853 authorizes the pre-trial restraint of substitute assets. Pet. at 7, n.1.

and from the alleged criminal activity. The district court determined that the account could remain frozen only until the government proved the specific amounts subject to forfeiture. Savran at 1185.

Similarly, the Sixth Circuit in United States v. Brown, 988 F.2d 658 (6th Cir. 1993), held that, pursuant to § 1345, the "court may freeze only those assets related to the alleged fraud." The Luis district court below cited other aspects of the Brown decision (*see* Pet. App. 10-11), but never mentioned Brown's premise that untainted assets may not be frozen. The Eleventh Circuit below never mentioned Brown.

In United States v. Sriram, 147 F. Supp. 2d 914 (N.D. IL. 2001), the district court rejected an effort by the government to freeze assets above and beyond assets traceable to the charged Medicare fraud. (The government was seeking treble damages.) The court analyzed the legislative history and other decisions applying § 1345, and concluded that "the cases do uniformly state that the assets frozen must be 'traceable to the allegedly illicit activity.'... These statements are consistent with this Court's statutory interpretation that under Section 1345 only those assets traceable to the alleged violation may be frozen." Sriram at 947 (citing Brown; United States v. Fang, 937 F Supp. 1186 (D. Md. 1996); and United States v. Quadro Corp., 916 F. Supp. 613 (E.D. Tex. 1996)).

Having interpreted § 1345 to apply to untainted assets, the court below unnecessarily raised serious constitutional questions that would be avoidable by a

less aggressive interpretation, as discussed in Section III, *infra*.[17]

II. THE COURT OF APPEALS BASED ITS RULING ON FOUR DECISIONS, NONE OF WHICH DECIDED, OR EVEN ADDRESSED, THE ISSUE PRESENTED.

The Court of Appeals stated that it would "review questions of law, such as a statute's constitutionality and whether a preliminary injunction violates an individual's constitutional rights, *de novo*." Pet. App. 3. However, the court was lax — if not careless — in discharging its responsibility, giving only cursory attention to Petitioner's claims, and no thoughtful attention whatsoever to the holdings of the authorities on which it relied, concluding:

> [t]he arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley v. United States*, ___U.S. ___, 134 S. Ct. 1090, 1105, 188 L. Ed. 2d 46 (2014); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631, 109 S. Ct. 2646, 2655, 109 S. Ct. 2667, 105 L. Ed. 2d 528 (1989); *United States v. Monsanto*, 491 U.S. 600, 616, 109 S. Ct. 2657, 2667, 105 L. Ed. 2d 512 (1989); and *United States v. DBB, Inc.*, 180 F.3d 1277, 1283-84 (11th Cir. 1999). Accordingly, we affirm the district court's

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[17] *See* A. Scalia & B. Garner, Reading Law (West: 2012), pp. 247-51.

> order granting the government's motion for a preliminary injunction. [Pet. App. at 3.]

None of these four decisions addressed the government's claimed authority to seize untainted assets.

Kaley v. United States involved seizure of an indicted defendant's assets prior to trial under 21 U.S.C. § 853(e), which governs criminal forfeitures. Unlike here, no untainted assets were seized in Kaley. Indeed, writing for the Court, Justice Kagan described the purpose of criminal forfeitures as being "imposed upon conviction to confiscate assets used in or gained from certain serious crimes." Kaley, 134 S.Ct. at 1094. "There must be probable cause to think ... that the property at issue has the requisite connection to that crime." *Id.* at 1095. The Court noted that, "[a]t oral argument, the Government agreed that a defendant has a constitutional right to a hearing on" whether "the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Id.* at 1095 n.3. The Court noted that "the Government sought a restraining order to prevent the Kaleys from transferring any assets traceable to or involved in the alleged offenses ... except as to $63,000 that it found ... was not connected to the alleged offenses." *Id.* at 1095-96.

Caplin & Drysdale v. United States also involved 18 U.S.C. § 853, which "authorizes forfeiture to the Government of 'property constituting, or derived from ... proceeds ... obtained' from drug-law violations...." *Id.* at 619-20. Justice White stated that "[t]he

forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." *Id.* at 625. Nevertheless, "[t]here is no constitutional principle that gives one person the right to give another's property to a third party [attorney]." *Id.* at 628. United States v. Monsanto, decided the same day as Caplin & Drysdale, involved a pretrial seizure under 18 U.S.C. § 853, and a claim that the statute should be interpreted to allow use of seized tainted funds to retain counsel. Justice White described this statute as providing "that a person convicted of the offenses charged ... 'shall forfeit ... any property' that was derived from the commission of these offenses." *Id.* at 607. The Court found "no exemption" from this provision "for assets which a defendant wishes to use to retain an attorney." *Id.* at 614. Neither case seized untainted assets.

United States v. DBB, Inc. did involve 18 U.S.C. § 1345, and an injunction which would allow the seizure of "property of equivalent value" as in the instant case. However, the court made clear that "[b]oth parties agree that subsection (a)(2)(A) authorizes injunctions to freeze property obtained through fraud or traceable to fraud and that subsection (a)(2)(B) authorizes TROs that freeze property of equivalent value."[18] The only issue litigated was "whether subsection (a)(2)(B) ... also authorizes the court to grant injunctions" to freeze

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[18] This statement is consistent with Savran, which permitted a TRO against an entire bank account pending a hearing to establish which amounts were tainted and untainted. Savran at 1185.

those categories of property. The defendant challenged only whether a seizure of "property of equivalent value" was permitted in an injunction, rather than a restraining order. The government's authority to seize "property of equivalent value" in some form was conceded. The parties never briefed, and the Court of Appeals never decided, whether "property of equivalent value" could be seized, and thus the issue could not have been "foreclosed" to the Petitioner in the present case, as claimed by the panel below.

III. THE COURTS BELOW HAVE ERRONEOUSLY SUBSTITUTED PRAGMATISM FOR THE COMMON LAW OF PROPERTY.

In 1989, the Eleventh Circuit decided an asset forfeiture case under § 1345. The court began by stating a useful maxim: "[w]hen the right point of view is discovered, the problem is more than half solved." United States v. Bissell, 866 F.2d 1343, 1350 (11th Cir. 1989) (citations omitted). That decision did not involve a seizure of untainted assets,[19] but it proposed the right starting point to evaluate asset forfeiture cases. First, the Bissell court stated the constitutional problem:

> Attachment, sequestration, and other restraint placed upon property, prior to judgment may, when done **improperly**, amount to the **taking**

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[19] Bissell at 1350 ("[A]ppellants do not contend that the government wrongfully restrained assets having no connection with criminal activity.").

> **of property without due process of law.** [*Id.* (emphasis added)]

To avoid a Fifth Amendment violation, the Court explained, the government is not entitled to a pre-judgment seizure of assets on the theory that "government's efforts [were] to collect an **indebtedness**." Assets could only be seized where "**none of the defendants have ever owned any of these assets.**" Bissell at 1350 (emphasis added).

The Court of Appeals drew on an analogy from another court to make its point:

> Suppose a bank is robbed and **$100,000 taken**. A defendant is **arrested in possession of $100,000** and nothing more. The defendant protests his innocence and claims, **without the slightest proof**, that the $100,000 that was in fact a gift from a friend. Surely no one will contend that the $100,000 must be made available to pay the defendant's lawyer, and not be kept available for return to the bank in the event the defendant is found guilty. [Bissell at 1351 (emphasis added).]

The district court below purported to base its decision on the very same bank robber illustration used by the Bissell court, but the decision it reached could not have been more antithetical to the principles implicit in the Eleventh Circuit opinion. The district court below explained "[t]he reason the bank robber is not permitted to use the $100,000 to hire a lawyer is obvious. The money does not belong to him." So far so

good, but then in continuing to expound on the hypothetical, the district court revealed that it had no understanding whatsoever of the rule that had been articulated by the Eleventh Circuit:

> But suppose the bank robber in the example above spent the $100,000 that he stole. It just so happens, however, that he has **another $100,000 he obtained legitimately**. Should his decision to spend the $100,000 he stole mean that he is free to hire counsel with the other $100,000 when Congress has authorized restraint of those substitute assets? The **reasonable** answer is no. **The bank has the right to have those substitute, untainted assets kept available for return as well**. Therefore ... the most **reasonable** conclusion is that there is no Sixth Amendment right to use untainted, substitute assets to hire counsel. [Pet. App. at 32 (emphasis added).]

This outcome, the district court opined is "reasonable" (*id.*) and "common sense." *Id.* at 31. Fortunately, no judge's "common sense" may vary the principle that where the government does not have a superior claim to property, it cannot exercise control over that property. This is the principle that the Eleventh Circuit had correctly articulated, but which the district court below mangled in upholding the government's asset seizure of untainted goods.

IV. THE FOUNDERS NEVER INTENDED THE PEOPLE TO BE IN FEAR OF THE FEDERAL GOVERNMENT AS THEY ARE NOW.

If the decisions of the courts below are allowed to stand, no American can feel confident that he will be able to obtain a robust legal defense if charged with a federal crime. An individual's ability to use his own resources to retain counsel of choice to present an aggressive defense will be at the mercy of the prosecutor and the district court judge. The common law of property which undergirds both the Fifth and Sixth Amendments will have been jettisoned based on pragmatic considerations. The government's speculative future interest in a defendant's property will be deemed superior to the defendant's current ownership of that property.

Since asset forfeiture crept into the federal criminal justice system in 1971, the scope and extent of these laws has grown exponentially, as Congress has sought, and continues to seek, to empower prosecutors with more tools to combat crime. The law of unintended consequences has been given full sway. In 1996, enjoying the full support of the Supreme Court, a wife learned that the family car could be forfeited to Michigan on a nuisance theory if her husband used it even once for an assignation with a prostitute. Tina Bennis v. Michigan, 516 U.S. 442 (1996). There are now hundreds of federal asset forfeiture statutes. The U.S. Department of Justice devotes increasing effort to training federal prosecutors to take assets from the American people. Fortunately, the American people are awakening to

the innumerable abuses that are being visited upon them by their government in the name of fighting crime.[20]

Asset forfeiture has become the tip of the spear wielded by prosecutors against Americans in a federal criminal justice system designed to extract guilty pleas and collect financial awards. Polls report that Americans now, more than ever, live in fear of the federal government and what it is capable of doing to them and other law abiding persons.[21] Many Americans believe that the greatest threat to their liberty comes from the very entity that was put in place to protect them.

It was never meant to be this way. The U.S. Constitution hardly provides unquestioned support for the type of robust federal criminal code that has developed in recent years.[22] However, Congress' promiscuous use of the Commerce Clause, combined with the courts' neglect of the Tenth Amendment, has

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[20] M. Sallah, R. O'Harrow, & S. Rich, "Stop and seize," *Washington Post* (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize.

[21] *See, e.g.*, "37% of Voters Fear the Federal Government," Rasmussen Reports (Apr. 18, 2014), http://tinyurl.com/mjnm6br.

[22] Indeed, the Constitution expressly authorizes Congress to create only a handful of federal criminal offenses, such as counterfeiting (U.S. Const., Art. I, Sec. 8, cl. 6), piracy (*id.*, Art. I, Sec. 8, cl. 9), and treason (*id.*, Art. II, Sec. 4; Art. III, Sec. 4). A few additional categories of federal crimes can be implied from other powers, such as tax fraud (*id.*, Art. I, Sec. 8, cl.1), and immigration fraud (*id.*, Art. I, Sec. 8, cl. 4).

enabled the federal government to occupy the field of criminal law that was supposed to be reserved to the states. There are now so many federal crimes that even the federal government itself has lost count, but all estimates put it in the many thousands.[23]

In an era where even law-abiding persons can unwittingly commit serious federal crimes,[24] the federal government's tentacles touch every aspect of daily life. Federal prosecutors already have a fearsome arsenal of weapons at their disposal to use against anyone who enters their crosshairs. Prosecutors "stack" charges for the same set of conduct, so long as each crime requires proof of an additional element that another does not.[25] Prosecutors often over-charge crimes that they know they could never hope to prove beyond a reasonable doubt, so that they retain bargaining power to accept guilty pleas for lesser offenses. M. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 314 (Dec. 1975)

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[23] *See* G. Fields & J. Emshwiller, "Many Failed Efforts to Count Nation's Federal Criminal Laws," *Wall Street Jour.* (Jul. 23, 2011).

[24] *See* H. Silverglate, Three Felonies A Day: How the Feds Target the Innocent (Encounter Books: 2011).

[25] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

at 294. If prosecutors have the additional incentive to overcharge so that they can seize any and all untainted assets, the risk that no one will have any meaningful right to their day in court grows exponentially.

CONCLUSION

Giving the federal government the power to seize tainted assets of a defendant, or even a convicted criminal, is a fearsome power, but can be understood if the assets seized are the fruits of the crime. It is quite another to grant the government the power to seize the assets of a defendant which are unrelated to the crime. Not only is such a power "unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial" (Caplin & Drysdale at 635, Blackmun, J. dissenting), but also it undermines centuries of the common law of property. The petition should be granted.

Respectfully submitted,

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